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September 27, 1996

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By Hand

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Further Notice of Proposed Rulemaking
CS Docket No. 96-83

Dear Mr. Caton:

On behalf of CellularVision USA, Inc., enclosed please find an original and six (6) copies of its Comments filed in the above-referenced rulemaking proceeding.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Michael R. Gardner
Counsel for CellularVision, USA, Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	

COMMENTS

CellularVision USA, Inc.[1] ("CellularVision"), by its attorneys, hereby files Comments in regard to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced proceeding. At the outset, CellularVision urges the Commission to continue to fashion rules in this proceeding which implement the explicit intent of Congress to protect the ability of all viewers to receive various video programming services available to consumers in the U.S. video marketplace. Importantly, the Commission should not limit the scope of its rules to those viewers who live in single family homes — thereby discriminating against viewers, who constitute more than 35% of the U.S. population and often are in the greatest need of these protections, simply because they live in rental apartments, condos, co-ops and other facilities. Clearly, if the Commission were to limit its rules in such a fashion to exclude more

[1] CellularVision USA, Inc. is publicly traded on the NASDAQ National Market under the symbol "CVUS."

than 35% of the viewing public, the obvious intent of Section 207 of the Telecommunications Act of 1996 ("Telecom Act") would be severely and unnecessarily frustrated.[2]

I. Introduction

CellularVision is the parent of CellularVision of New York, L.P., which holds a commercial license to use the 27.5-28.5 GHz band in the New York Primary Metropolitan Statistical Area to operate a Local Multipoint Distribution Service ("LMDS") video delivery system. CellularVision is the recognized pioneer of LMDS technology, which is a wireless, multi-cell, two-way video, telephony and data service that the Commission is poised to license on a nationwide basis through spectrum auctions as a competitive alternative to services provided by both cable operators and local exchange carriers.[3]

Section 207 of the Telecom Act requires the Commission, pursuant to its general powers under Section 303 of the Communications Act, to "promulgate regulations to prohibit restrictions that impair a *viewer's* ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast

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[2] Telecom Act, Pub. L. No. 104-104, 110 Stat. 56, 114 (1996) §207.

[3] See In the Matter of Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, First Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 92-297, FCC 96-311 (released July 22, 1996).

satellite services."[4] In its Comments and Reply Comments filed prior to the adoption of the Report and Order in this proceeding, CellularVision argued that the Commission should extend the protections of Section 207 to LMDS since the same pro-consumer and competitive public policy reasons that prompted Congress to protect the reception of broadcast, MMDS and DBS services apply equally to LMDS — a technology which is soon to be another wireless competitor in the video marketplace.[5] CellularVision also argued, consistent with Congressional intent, that the Commission should not distinguish between single family homes and MDUs when implementing Section 207, as Congress intended to protect all viewers, regardless of type of residence.[6]

In its Report and Order in the above-referenced proceeding, the Commission embraced CellularVision's suggestion, consistent with Section 207 of the Telecom Act, by establishing a rule that prohibits restrictions impairing the installation, maintenance or use of an antenna designed to receive numerous video programming services, specifically including LMDS.[7] However, the Commission limited the interim applicability of this rule to antennas located on property "within the exclusive use or control of the antenna users where the user has a direct or indirect ownership interest

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[4] Telecom Act §207 (emphasis added).

[5] See CellularVision Comments, pp. 2-4 (filed May 6, 1996); Reply Comments, pp. 2-3, filed May 21, 1996.

[6] See CellularVision Reply Comments, p. 4.

[7] 47 C.F.R. § 25.104(a)(2); see also Report and Order, CS Docket No. 96-83, FCC 96-328, ¶ 30 (released August 6, 1996).

in the property."[8] Accordingly, in this FNPRM, the Commission is requesting further comment on situations involving: (1) property not under the exclusive use and control of a person who has a direct or indirect ownership interest; and, (2) residential or commercial property subject to a lease agreement.[9]

II. Congress Did Not Intend for the Commission to Exclude a Significant Portion of the *Viewing* Public from the Protection of its Preemption Rule

As CellularVision previously argued prior to the adoption of the Report and Order, the explicit intent of Congress clearly would be defeated if the Commission creates arbitrary exemptions to the broad scope of the preemption rule. Specifically, both (1) rental property and (2) other property owned by an individual where the roof or other exterior surface required for antenna placement is under the control of the landlord, or is a "common area" under joint ownership, must receive the protections of the rule as mandated by Congress. By Section 207, Congress sought to protect a "*viewer's* ability to receive video programming services . . ."[10] Congress did not discriminate among "viewers" based upon their choice of residence, whether single family homes, or multi-unit residences, including but not limited to multi-family dwelling units ("MDUs"), interconnected townhomes within "planned communities" or mobile home parks. As the House Report stated, "[e]xisting regulations, *including but not limited to*, zoning laws, ordinances, restrictive covenants or home owners'

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[8] See 47 C.F.R. § 25.104(a).

[9] FNPRM, ¶¶ 48, 63.

[10] Telecom Act §207 (emphasis added).

association rules, shall be unenforceable to the extent contrary to this section."[11] Accordingly, since Congress explicitly intended a broad application of its preemption rule, the Commission cannot now chose to ignore that clear Congressional mandate by limiting its rules to only those regulations involving ownership interests where the viewer-resident has exclusive control.

Moreover, the Commission based its adoption of a rule implementing Section 207 on the presumption that two complementary federal objectives would be promoted: (1) ensuring that *consumers* have access to a broad range of video programming services; and, (2) fostering full and fair *competition* among different types of video programming services. However, as the Commission acknowledged, the *only* situation involving "property within the exclusive control of the antenna user where the user has a direct or indirect ownership interest in the property" is a "single family detached home or a single family row house."[12] Importantly, more than 35% of the U.S. population resides in multi-unit residences, either on a rental basis, or in condos or co-ops.[13] Many of these viewers, whose incomes on average are less than the incomes of consumers who can afford single family housing, are in special need of competitive video alternatives from a cost standpoint. Moreover, these viewers

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[11] H.R. Report No. 204, 104th Cong., 1st Sess. 124 (1995) (emphasis added).

[12] Report and Order, ¶ 49.

[13] See U.S. Department of Commerce "1990 Census of Housing, General Housing Characteristics," Table 12 (citing the combined number of housing units exceeding single-family detached and attached homes). Although this discussion is limited to residential property, CellularVision would oppose any attempt to exclude commercial property from the protection of the rule.

traditionally have been afforded the least amount of property rights, especially in urban areas, and thus have the greatest need for the protections of the Commission's preemption rules. Thus, if the Commission arbitrarily reduces the broad reach of the Congressional mandate of Section 207 only to single family homes, the Commission's rule will frustrate Congress' clear intent by benefiting only a select, limited category of consumers while denying the benefits of increased choice and competition in the video programming market to more than 35% of U.S. viewers. Clearly, limiting the applicability of the preemption rule solely to single family homes is discriminatory and would defeat the intent of Congress in adopting Section 207. Accordingly, restrictions applicable to any classification of property, and not just those that could be categorized to fit a "single family home" scenario, should constitute *per se* invalid restrictions under Section 207.

III. The Commission Has the Statutory Obligation and Legal Authority To Include Multi-Unit Dwellings Within Its Preemption Rule

The Commission has both the authority and the duty, as mandated by Congress, to extend the preemption rule to rental and other properties not within the exclusive control of an owner.[14] In implementing the interim rule pursuant to the Report and Order, the Commission correctly dismissed arguments that it was exceeding its constitutional authority under the Commerce Clause by preempting state, local or other non-governmental restrictions on receive antennas.[15] Congress'

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[14] See 47 U.S.C. §§ 207, 303.

[15] See Report and Order, ¶¶ 9-12.

action in delegating authority to the FCC under Section 207 is legally supportable and fully consistent with the Commerce Clause.[16]

Importantly, nothing has changed to alter the Commission's authority with respect to the property classifications which are the subject of this FNPRM. Although CellularVision applauds the Commission's desire to develop a thorough record, the Commission's diligent efforts arguably have created an unnecessary distinction between housing options that was never intended by Congress. In fact, although the Commission has created three categories of property rights and is analyzing whether it can apply Section 207 to each one, Congress did not make such distinction.[17] Simply stated, Congress did not mandate that the Commission treat similarly situated viewers differently based on their types of residences. Rather, Section 207 broadly speaks to protecting a *viewer's* ability to receive video programming.[18] Accordingly, the Commission should not arbitrarily exclude any of these *viewers* from the rules' protection solely based on choice of residence.

With regard to the Commission's second category of properties — those in which an owner does not have exclusive control over antenna placement, i.e.,

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[16] See generally United States v. Lopez, 115 S. Ct. 1624 (1995).

[17] Obviously, Congress could have easily qualified its preemption rule to apply solely to single family homes, or to situations involving both "an ownership interest and exclusive control."

[18] Consistent with this inclusive approach intended to fulfill the intent of Congress, CellularVision notes that the Commission wisely included within the scope of its preemption rule additional technologies beyond those expressly stated in Section 207, such as LMDS, and found that non-governmental restrictions should also be preempted under the rule. See Report and Order, ¶¶ 30, 51.

condos, co-ops, multi-family townhomes — CellularVision does not oppose the concept of a "coordinated installation" approach managed by a community association as long as individual viewers are not precluded from utilizing separate receive antennas either on exterior surfaces or on a rooftop.

With regard to rental properties, the Commission's third property classification, CellularVision agrees with several of the earlier Comments in the Commission's initial satellite proceeding[19] that the holding in Loretto v. Teleprompter Manhattan CATV Corp. ("Loretto") is factually distinguishable and is not controlling on the issue of landlord-tenant relationships.[20] In a case in which the court itself warned that its holding was "very narrow," Loretto addressed the rights of a third party cable company and its efforts to use the New York mandatory access statute to gain access to an MDU.[21] However, the court explicitly distinguished between regulations that require a landlord to accommodate the physical occupation of a portion of its building by a third party and those which regulate the landlord-tenant relationship.[22] In fact, the court adroitly noted that its decision "in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers and the like

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[19] See Reply Comments of DIRECTV, Inc., IB Docket No. 95-59, p.8 (filed May 6, 1996); Further Reply Comments of the Satellite Broadcasting and Communications Association of America, IB Docket No. 95-59, pp. 5-6 (filed May 6, 1996).

[20] 458 U.S. 419 (1982).

[21] Id. at 441.

[22] See id. at 440-441.

in common areas of a building."[23] Certainly, express federal powers granted under Section 207 to restrict a landlord's ability to "impair" a viewer's ability to receive video signals, as defined by the Commission, cannot be classified as a taking because these are intrinsic to the landlord-tenant relationship.[24]

IV. Conclusion

The Commission has correctly determined in its Report and Order in this proceeding that Congress, in enacting Section 207 of the Telecom Act, intended that viewers in single family housing should have the protections from government and non-governmental restrictions that would impair viewer's ability to receive video programming in order to promote consumer choice and competition in the burgeoning U.S. video marketplace — a marketplace where LMDS is poised to offer an important new competitively-priced choice for viewers. However, the Commission must not now ignore more than 35% of the viewing public in the United States who, for whatever reason, choose or are forced to reside in MDUs, condos, co-ops or other facilities. Obviously, Congress did not intend for the Commission to discriminate against this large portion of the viewing public. Viewers who often desperately need access to competitively-priced video options, and are in the greatest need of the

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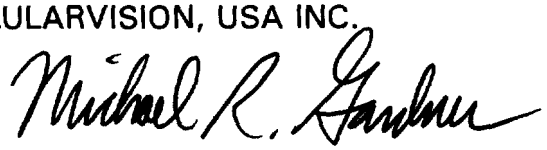
[23] Id. at 440. In further clarifying its power to adjust landlord-tenant relationships, the Court recognized that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." Id.

[24] See Report and Order, ¶ 14 (defining restrictions which impair a viewer's ability to receive signals).

rules' protections based on their limited property rights, simply will not get the necessary relief from these restrictions unless the Commission extends its preemption protection to all viewers, not simply those viewers in single family residences. The broad and unmistakable intent of Congress is clear from the language of the statute and its accompanying Conference Report — language which expresses a logical and resounding mandate for consumer choice and competitive parity for all video program viewers in the United States.

Respectfully submitted,

CELLULARVISION, USA INC.

By: 

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September 27, 1996

Certificate of Service

I, Michael C. Gerdes, hereby certify that copies of the foregoing "Comments" of CellularVision USA, Inc., were delivered by hand, on September 27, 1996, to the following:

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